Supreme Court of the United States.

October Term, 1902.

WILLIAMS et al

v.

KNOWLTON.

No. 116.

Supplemental Brief of Plaintiffs in Error.

The brief of the defendant in error attempts to support the statute and decree upon the police power; and at the argument the question was put from the bench whether the decree should be reversed if the court should think that this statute could have been passed in the exercise of that power.

We have not fully discussed this question because we have not understood it to be now open. The State court having adjudged the statute to be an act of eminent domain, we have assumed that this court will accept that construction, and deal with the statute accordingly; relying on "the elementary rule that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof," as declared in Cargill Co. *v.* Minnesota, 180 U. S. 452, 466, and cases cited.

If this is not conclusive, the answer suggested at the argument by Mr. Justice Peckham appears to be. It cannot be assumed that the legislature would have done this thing at all, except by eminent domain with provision for compensation. No such act of the legislature has ever been passed, and it would seem, therefore, that its power to pass such an act is not and cannot in this case be brought in question or considered.

Nor can it be assumed that the State court would have made this decree except in view of what it seems to consider adequate constitutional provision for compensation, nor that it would have sustained the statute at all without compensation. Each opinion of the court expressly stands on the provision for compensation; Record, pp. 54, 55, 56, 57, 60, 61. The *obiter* remark that "it would be hard to say that this statute might not have been passed in the exercise of the police power," was made in the first opinion, on demurrer, and before the facts, showing the stage of the enterprise at which the statute fell upon it, and the large investments, expenditures, demolition of buildings, and other acts done by the owners on the faith of the then existing law and of their permit (shown in the Record, pp. 28, 29, which please observe), were presented to the court. (Record, pp. 54, 27.) The only effect of this remark is to make it further certain that, in the view of the court, the act was *not* passed in the exercise of the police power.

Accordingly, for this court to entertain the argument based on the police power would be to attribute to the legislature an act which it has never done, and which presumably it never would have done; and to the State court a view of the law which it has not adopted, and cannot be supposed to have entertained; in order to sustain a statute passed and a decree made upon directly

opposite grounds, and to deny an asserted Federal right for a reason upon which neither court nor legislature ever stood, or presumably would have stood, to deny it.

If it is ever to be adjudged the law of the land that the States may restrict to ninety feet the height of all buildings, of any and every character (as this statute does) without consideration of the right of property owners to compensation under any circumstances (for if they are not entitled to compensation under the circumstances here disclosed they can hardly be in any case), it cannot be done until some State has made the attempt and raised the question. It is not raised here.

Such a statute as this, applied to this estate under such conditions, is essentially and necessarily a *taking*, and not a mere regulation, of property rights, as the legislature recognized and the State court held it to be. Authorities *infra*, and in original brief, p. 16.

The suggestion of counsel in argument that the public safety enters into the question is unfounded. Not a word in this record tends to show that this factor is in the case, or that the legislature or the court dealt with the subject with any reference to such a question. This wholly distinguishes the case from Salem *v.* Maynes, 123 Mass. 372, which was the case of a fire ordinance against wooden buildings. Nor is the application of that decision to a wooden building for which the cellar had been begun, a contract made, and some lumber bought, all apparently of small amount, sufficient warrant for its application, if it could otherwise be applied, to an enterprise of the character and magnitude shown in this record, arrested *in medias res* by this statute, with more than half a million of dollars already expended, and other contracts out and largely executed. (Agreed facts, Record, p. 29.)

The State court holds the building a purpresture

(Record, p. 59). A purpresture is an encroachment upon the *public domain*. If the public has not acquired title to the easement of exclusion above the height of ninety feet in the estate of the plaintiffs in error, there is no public domain there, and no purpresture, at least until the public title becomes complete by payment of compensation. (Authorities in original brief, p. 19). But exclusive public domain in or over private property cannot be acquired without compensation, by exercise of the police power. If it could be, every highway could be laid out free of compensation, on the ground of the public necessity; a higher ground than any which can be claimed for this statute.

Parker *v.* Commonwealth, 178 Mass. 199, a later case than the present, under a later but similar statute which exposes the real purpose of both, is highly instructive. There the legislature undertook in terms, in restricting the height of buildings about the state-house, to provide compensation only if and so far as the owners had a constitutional right to it. The court, by HOLMES, C. J., rejects the qualification; holds that without an express legislative adjudication that the public welfare requires the owners to be deprived of their rights without compensation, they are entitled to it; and casts all possible doubt upon the power of the legislature to make such an adjudication in any such case. If doubtful there, much more is it doubtful here. This case makes it substantially certain that the statute of 1893 would not have been sustained by the State court in the exercise of the police power without compensation.

If it were open to sustain the judgment upon the police power the question would be, whether it is consistent with

the Federal requirement of due process of law for a legislative decree to restrict to 90 feet the height of such a building as this, *at the time and under the circumstances disclosed in this record*, without compensation to the owners. (Wisconsin R.R. *v.* Jacobson, 179 U. S. 287, 301.) This would first call for examination of the history of the enterprise, shown in the agreed facts. (Record, pp. 28–32, 43–49.)

The current of authority is strongly against legislative power to declare or deal with such a building as this as a nuisance, or to apply such legislation under such conditions in the exercise of the police power, or, upon any ground, to cut down private rights to such an extent as that here disclosed, without compensation as for a taking of property. A judicial view of the subject which comes near being universal might well be deemed conclusive in determining, if it were presented, the question of what degree of respect and security for property rights in this regard is essential to the Federal requirement of due process of law. In addition to cases before cited see:

Yates *v.* Milwaukee, 10 Wall. 497.

Pumpelly *v.* Green Bay Co., 13 Wall. 166, 177, *et seq.*

Sweet *v.* Rechel, 159 U. S. at pp. 396 *et seq.*

(This case, cited in the original brief, is important upon the question of the sufficiency of the provision for compensation; the test applied by this court, under the constitution of Massachusetts, being that the statute must give the property owner "*an unqualified right to a judgment* for the amount of his damages." 159 U. S. at p. 402.)

Mass. Decl'n of Rights, XII, XXX.

Baker *v.* Boston, 12 Pick. 184, 194.

Commonwealth *v.* Alger, 7 Cush. 53, 103–4.

Morse *v.* Stocker, 1 All. 150, 157–8.

Watertown *v.* Mayo, 109 Mass. 315, 319.

Lowell *v.* Boston, 111 Mass. 454.
Sawyer *v.* Davis, 136 Mass. 239, 243.
Wilkins *v.* Jewett, 139 Mass. 29.
Newton *v.* Belger, 143 Mass. 598.
Rideout *v.* Knox, 148 Mass. 368, 374.
Miller *v.* Horton, 152 Mass. 540, 543, 547-8.
Com. *v.* Parks, 155 Mass. 531, 533.
Langmaid *v.* Reed, 159 Mass. 409, 411.
Bent *v.* Emery, 173 Mass. 495.
Quintini *v.* Bay St. Louis, 64 Miss. 483.
Waupen *v.* Moore, 34 Wis. 450.
Janesville *v.* Carpenter, 77 Wis. 288, 301, 304.
Priewe *v.* Wisconsin, &c., Co., 93 Wis. 534.
Priewe *v.* Wisconsin, &c., Co., 103 Wis. 537.
Ex parte Whitwell, 98 Cal. 73, 78.
People *v.* Elk River Co., 107 Cal. 221, 227.
State *v.* Railway Co., 68 Minn. 381, 385.
Platt *v.* Waterbury, 72 Conn. 531, 551.
Ruhstrat *v.* People, 185 Ill. 133, 141.
Williamson *v.* Liverpool Ins. Co., 105 Fed. 31, and cases cited.
Mayor of Hudson *v.* Thorne, 7 Paige, 261.
Evansville *v.* Miller, 146 Ind. 613.
Des Plaines *v.* Poyer, 123 Ill. 348.

The information and decree stand solely upon the statute of 1893. The construction put by the State court upon that statute as an act of eminent domain is the necessary construction. There is no question of the police power in the case. The statute must be dealt with as an act of eminent domain, and the decree as an attempt to enforce an act of eminent domain; subject to all the constitutional restraints which affect the exercise of that power.

In view of a suggestion of counsel in argument, that the plaintiffs in error have delayed to press their petitions for damages against the city, we refer to the answer to that suggestion on pages 35, 36, of the original brief; and in view of some other observations, attention is called to the agreed facts set out in the Record, page 31.

The plans and photographs referred to in the Record, pages 29, 32, 45, 48, 49, were filed with the record and are in possession of the clerk. It was not deemed necessary to reproduce them, as they were not understood to be material to the question argued.

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